Concrete Pipe and Products Corp.-Syracuse Division *and* United Steelworkers of America, AFL–CIO–CLC, Local Union 14534. Cases 3–CA–13724 and 3–CA–13932

September 30, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On September 27, 1988, Administrative Law Judge Harold B. Lawrence issued the attached decision. The General Counsel filed exceptions, the Respondent filed exceptions and a supporting brief, the Charging Party filed cross-exceptions, and the General Counsel, the Respondent, and the Charging Party filed answering briefs.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision, the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this decision and to substitute the attached Order for the order recommended by the judge.

The judge found that the Respondent violated Section 8(a)(5) and (1) by failing to furnish to the Union requested economic information, by refusing to bargain in good faith, and by unilaterally changing terms and conditions of employment. The judge also found that the Union engaged in an unfair labor practice strike in response to the Respondent's bargaining violations and that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate unfair labor practice strikers after their unconditional offer to return to work. For the reasons below, we find that the Respondent did not violate Section 8(a)(5) and (1) and that the strike was economic in character. We find, however, that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate economic strikers to positions that became available after their unconditional offer to return to work.

1. The complaint alleges that the Respondent failed to furnish requested financial information to the Union while taking the position at bargaining that it was financially unable to afford the costs of the soon-to-expire collective-bargaining agreement. The judge found that the Respondent triggered a duty to disclose economic information under *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956), by virtue of the following opening statement of the Respondent's president, Nicholas Melfi, at the outset of negotiations.[3]

> Our business is suffering a declining market due to the many new competitive products such as the (i.e. various plastics).
>
> Also there has been intense competition from several concrete pipe producers. (i.e. K & S Supply—Buffalo, Bundy Concrete Products—Utica & Watertown, Loomis & Sons—Montrose, Kistner Concrete Products—Buffalo, Lakeland Products—Rochester). These competitors are non-union and it is my understanding that their labor costs are very low. Also they do not have contractual restraints as we do.
>
> Consequently it is imperative that we considerably lower our labor costs. We must have the flexibility to manage and supervise in a way to increase productivity, product quality and customer service. Our current agreement does not give us the flexibility we need, so there have to be changes made.
>
> To survive in today's market we have got to be able to be competitive, and to be competitive, wage rates and benefits must be lowered. These are our Contract Proposals which we believe are necessary to accomplish what I have said.

We disagree with the judge and find that the Respondent did not trigger a duty to furnish economic information. The Respondent's claims here, as set forth in Melfi's statement, do not raise a claim of present inability to pay under *Truitt*. The Respondent's assertions pertain only to declining market conditions attributable to competition from other businesses. Melfi's reference to the Respondent's need ''to survive'' is nothing more than a restatement of its stated desire to compete—''to survive in today's market we have got

[1] The Charging Party's motion to strike portions of the Respondent's exceptions and brief is denied. The Charging Party contends that the Respondent may not raise a defense that the employees' offer to return to work was conditional because its answer to the consolidated complaint admitted that employees made an unconditional offer to work on July 30, 1987. The Respondent's position, however, is that subsequent to the July 30, 1987 offer to return, the offer was thereafter made conditional. This defense is not precluded by the Respondent's answer.

The Charging Party's motion to strike the Respondent's letter dated July 25, 1989, is granted as that letter contains substantive argument and was filed subsequent to the time for the filing of briefs under Sec. 102.46 of the Board's Rules and Regulations. In contrast, the Charging Party's submission of July 17, 1989, contains no substantive argument. See *Downtowner Motor Inn*, 262 NLRB 1058 fn. 1 (1982).

[2] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The judge discredited the testimony of the Union's negotiators that the Respondent on numerous occasions during bargaining specifically pleaded that it was losing money and could not afford to pay the Union's demands. The judge found, however, that even under Melfi's credited version, a duty to disclose economic information was triggered.

to be able to be competitive, and to be competitive, wage rates and benefits must be lowered.'' The Respondent did not assert that it was losing money or that its business was at some imminent risk of closing down. As the Respondent simply asserted that it was not competitive and that it wanted to reduce its costs, it was not obligated to furnish economic information to the Union and, therefore, did not violate Section 8(a)(5) and (1) by failing to comply with the Union's information request.[4]

2. The judge found that the Respondent failed to bargain in good faith during the course of negotiations and unilaterally implemented its financial proposals as to wages, holidays, medical insurance premiums, and sick leave without first reaching a good-faith impasse with the Union. We disagree.

As the judge repeatedly found in reaching his conclusion that the Respondent failed to bargain in good faith, the Union's request that the Respondent furnish economic information was, from the outset, central to the parties' negotiations. At the beginning of negotiations, on March 10, 1987, the Respondent presented economic demands that called for substantial reductions in existing benefits[5] In response, according to the credited testimony of Melfi, Union Representative George Prenatt immediately stated it was a policy of the International Union ''not to negotiate for concessions unless they were given the company books'' and a reason for such concessions was thereby demonstrated. Thus, in finding that the Respondent failed to bargain in good faith, the judge concluded that ''the failure of the negotiations was preordained by Respondent's own failure to make cost data available to the Union,'' that ''Melfi's refusal to grant access to company records which supposedly justified such demands, amount[ed] to a rejection of the collective-bargaining process and denigration of the Union,'' that agreement was not out of reach ''except for Respondent's insistence upon a one-third wage reduction and steep cuts in other benefits while refusing to give the Union an informational basis on which to judge the reasonableness of the demand,'' that Melfi sought deep economic concessions ''without meeting the Union's demand for verification of the need for such drastic action, thereby making rejection of his bargaining proposals inevitable,'' and that ''Melfi steadfastly refused access to the records with full awareness that the Union could not agree to his demand for concessions without access to the company's financial records.''

We have found that the Respondent was, in fact, entitled to reject the Union's request for financial information. As a result, the Respondent's unwillingness to furnish the requested data was not evidence of bad faith. Further, as the eventual breakdown of negotiations clearly was attributable to the Union's insistence that the Respondent furnish financial information to substantiate its demand for concessions and to the Respondent's rejection of that demand, it follows that the collapse of the negotiations was, as the judge found, ''inevitable'' in view of these respective bargaining postures. Accordingly, we are unable to conclude, as did the judge, that the collapse of the negotiations was attributable to any bad faith on the part of the Respondent in steadfastly declining to furnish economic information.

We also reject the judge's findings that the Respondent's proposals were so intrinsically unreasonable as to constitute evidence of bad faith, that the Respondent denigrated the Union in order to frustrate negotiations, and that the Respondent prematurely broke off negotiations in a manner demonstrating bad faith.

In *Reichhold Chemicals*, 288 NLRB 69 (1988), we found that, when appropriate, bargaining proposals can be examined to consider whether a demand is clearly designed to frustrate agreement. This inquiry, however, is *not* a subjective evaluation of the proposals' content. *Litton Microwave Cooking Products*, 300 NLRB 324 (1990). Proposals that seek deep reductions in allegedly noncompetitive existing benefits are not necessarily indicative of a desire to frustrate negotiations. The General Counsel presented no evidence that the Respondent was factually inaccurate when it informed the Union at the outset of negotiations that its competitors (which the Respondent specifically named) had ''very low'' labor costs in comparison to the Respondent. An employer's desire to bring its labor costs in line with its competitors, standing alone, is not an illegitimate bargaining goal. If those competitors happen to be nonunion, it does not necessarily follow that an employer's attempt to bargain for comparable wages and benefits means that the employer is seeking to frustrate negotiations in order to rid itself of the Union. The judge found, however, that ''to Melfi, meeting competition meant to go non-union, either actually or practically.'' According to the judge, a proposal that seeks wages and benefits that may be comparable to nonunion wages and benefits is inherently unreasonable. We reject the judge's premise because it is essentially a subjective evaluation of the content of the Respondent's proposals, an inquiry that is not appropriate under *Reichhold Chemicals*.

The judge also found evidence of bad faith based on the Respondent's cessation of bargaining at 6 p.m. on

[4] The judge found that the Union's negotiators operated under the erroneous belief that the Respondent was, in fact, losing money and that the Respondent did nothing to enlighten them about their actual economic condition. As the judge found in discrediting the Union's witnesses, however, the Respondent never told the Union that it was losing money.

[5] The Respondent sought a cut in wages of approximately one-third, a reduction in paid holidays and vacations of about 50 percent, and substantial reductions in paid sick leave, cost of medical insurance, and other benefits.

March 20, 1987, 6 hours before the expiration of the collective-bargaining agreement. In our view, the Respondent's failure to bargain to the stroke of midnight under the circumstances of this case is not indicative of a desire to frustrate negotiations. Because of the parties' differences regarding the Union's entitlement to financial information, the Respondent and the Union were far apart on economic terms. Although the Respondent improved its economic offer to some extent during the course of negotiations, and the parties reached agreement on a number of noneconomic matters,[6] the Respondent still sought substantial reductions, while the Union continued to seek a wage increase, until the Union's last offer at the end of the session to continue the status quo for 1 year. At that point, there was no likelihood of real progress, and it is clear that negotiations collapsed because the parties were hopelessly deadlocked. Accordingly, an impasse was reached on March 20, 1987, and the Respondent was entitled to implement its last offer to the Union.[7]

3. The judge found that the strike which commenced on March 21, 1987, was an unfair labor practice strike because it was attributable to the Respondent's conduct in violation of Section 8(a)(5) and (1). The judge also found that on July 29, 1987, the Union tendered an unconditional offer to return to work on behalf of the strikers and that on July 30, 1987, the Respondent informed the Union that it had no vacancies at that time. The judge found that, as unfair labor practice strikers, the returning strikers were entitled to immediate reinstatement and that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate them. As we have found that the Respondent did not violate Section 8(a)(5) and (1), it follows that the strike was not an unfair labor practice and that the strikers were economic strikers.

Under *Laidlaw Corp.*, 171 NLRB 1366 (1968), returning economic strikers are generally entitled to full reinstatement to their former positions on the departure of their replacements. At the hearing, the parties stipulated that ''after July 30, 1987, Respondent continued to hire employees to do bargaining unit work. The first employees hired after July 30 were on August 31, 1987, and approximately 15 have been hired and there have been separations.'' Accordingly, it is evident that bargaining unit positions have become available subsequent to the Union's unconditional offer to return to work[8] By failing to offer reinstatement to returning economic strikers consistent with their rights under *Laidlaw*, the Respondent violated Section 8(a)(3) and (1).[9]

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has failed and refused to reinstate economic strikers who have tendered unconditional offers to return to work, while subsequently hiring new employees to perform bargaining unit work, we find that the Respondent has unlawfully failed to reinstate economic strikers in accord with their statutory rights. Accordingly, the Respondent shall be ordered to offer economic strikers reinstatement to any former or substantially equivalent position that became available subsequent to their tender of an unconditional offer to return to work, and to make them whole for any loss of earnings or benefits they may have suffered by reason of the Respondent's unlawful failure to reinstate them, in accord with the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[6] We note that the Respondent's modifications of its initial offer distinguish this case from *American Meat Packing Corp.*, 301 NLRB 835 (1991).

[7] We find no merit to the judge's reliance on remarks attributed to foreman Bob Weaver by strike replacement David Guiffrida. Guiffrida testified that strike replacements were concerned about the stability of their jobs and asked Weaver what would happen when the strike was over. Weaver replied that the replacements should not worry, that their jobs were permanent, and that the ''Union guys,'' i.e., striking employees, would not be back. In context, Weaver's remarks do not tend to establish that the Respondent intended to frustrate negotiations and rid itself of the Union. Essentially, they show nothing more than Weaver's attempting to assure replacements that they would not be displaced by returning strikers.

[8] For the reasons set forth by the judge, we find that the Union's unconditional offer of July 29, 1987, to return to work remained unconditional at all pertinent times. We also find no merit to the Respondent's contention that employees are not entitled to reinstatement because they failed to *physically* present themselves for a return to work when positions became available. When positions became available, the Respondent was obligated to make offers of reinstatement. It failed to do so. Instead, although the unconditional offer to return to work remained outstanding, the Respondent informed the Union on August 20, 1987, that ''all strikers who make an unconditional offer to return will be considered'' for existing openings and should report to the Company and ''seek striker reinstatement.'' At no time did the Respondent unequivocally offer reinstatement. For these reasons, *Coca Cola of Memphis*, 269 NLRB 1101, 1105 (1984), cited by the Respondent, is inapposite. In that case the employer responded to an unconditional offer to return to work by directing that returning strikers report ready to begin work and that reinstatement ''will be given.''

[9] We shall leave to compliance ascertainment of the precise number and identity of returning strikers who may have been affected by the Respondent's failure to reinstate economic strikers to available former or substantially equivalent positions.

The Union contends that the replacements hired by the Respondent were not offered permanent positions. The record shows, however, that replacements were assured that they were hired as permanent replacements and were told that the only way this would change was if strikers were offered reinstatement as a settlement of the labor dispute. *Hansen Bros. Enterprises*, 279 NLRB 741 (1986), cited by the Charging Party, is inapposite. In that case the employer never told replacement employees that they were permanent.

ORDER

The Respondent, Concrete Pipe and Products Corp.-Syracuse Division, East Syracuse, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to reinstate economic strikers to any available former positions or to substantially equivalent positions that may have become available subsequent to their unconditional offer to return to work.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer economic strikers reinstatement to any available former positions or to substantially equivalent positions that may have become available subsequent to their unconditional offer to return to work.

(b) Make whole economic strikers who were unlawfully denied reinstatement for any losses they may have suffered as a result of the failure to reinstate them, as set forth in the amended remedy section of this Decision and Order.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of the Order.

(d) Post at the Respondent's facility in East Syracuse, New York, copies of the attached notice marked ''Appendix.''[10] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleged violations of the Act not found herein.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

CHAIRMAN STEPHENS, concurring.

I join my colleagues in finding that the Respondent violated Section 8(a)(3) and (1) by failing to offer reinstatement to returning economic strikers. I also agree that the Respondent did not violate Section 8(a)(5) and (1) by refusing to furnish economic information to the Union under *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956), and that the Respondent did not otherwise refuse to bargain with the Union in violation of the Act.

In finding that the Respondent was not obligated to disclose financial information, I rely on the fact that the Respondent never made an issue of its present or immediate financial condition. The Respondent stated no objective basis for its bargaining position that was subject to verification by reference to the Respondent's own financial records[1] The statements that, in the judge's view, triggered a disclosure requirement were the Respondent's assertions that it faced intense competition from other businesses and ''in order to survive in today's market we have got to be able to be competitive, and to be competitive, wage rates and benefits must be lowered.'' In my view, however, this kind of vague and general statement regarding the ability to ''survive'' in the face of competition, by itself, only places at issue the factual question of whether the Respondent is, indeed, operating at a competitive disadvantage as to wages and benefits. Such an assertion places at issue the difference between the wages and benefits paid by the employer and those paid by its competitors, but, without more, it does not place at issue the financial health of the business. The Respondent's reference to ''survival,'' standing alone and in the absence of any assertions of immediate economic peril, strikes me as nothing more than vague, strategic posturing.

Accordingly, for these reasons, I join my colleagues in finding that the Respondent did not violate Section 8(a)(5) and (1) by failing to furnish the requested economic information.

[1] The Respondent's president, Melfi, testified that he told the Union that nonunion competitors were beating the Company on bids and that the Respondent sought concessions to meet this competition. The Respondent's attorney, Hoover, testified that he told the Union that with the wage rates the Respondent was proposing, it would be able to bid more jobs, get more customers, and employees would be making more money because they would work more hours. These statements do not raise an issue of the Respondent's present and immediate economic health. Instead, they simply suggest that lower wages and benefits would translate into lower bids and more work for employees. This is neither a prediction of continued injury to the employer's business nor an assertion of poor financial condition.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to reinstate economic strikers to any available former position or to a substantially equivalent position that may have become available subsequent to their unconditional offer to return to work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the rights guaranteed them by Section 7 of the Act.

WE WILL offer economic strikers reinstatement to any available former position or to a substantially equivalent position that may have become available subsequent to their unconditional offer to return to work and WE WILL make them whole, with interest, for any loss of earnings and benefits they may have suffered as a result of our failure to reinstate them.

CONCRETE PIPE AND PRODUCTS CORP.-SYRACUSE DIVISION

Carl B. Newsome, Esq., for the General Counsel.
James Hoover, Esq. and *James L. Matte, Esq. (Clark, Paul, Hoover & Mallard),* of Atlanta, Georgia, for the Respondent.
James LaVaute, Esq. (Blitman & King), of Syracuse, New York, for the Petitioner.

DECISION

STATEMENT OF THE CASE

HAROLD B. LAWRENCE, Administrative Law Judge. This case was heard by me at Syracuse, New York, on January 19, 20, and 21 and March 8, 1988. The consolidated complaint alleges that in March 1987,[1] during the course of contract negotiations, Respondent, Concrete Pipe and Products Corp.-Syracuse Division, asserted that it could neither afford the economic package provided for in the expiring collective-bargaining agreement nor pay any increase in it, as demanded by United Steelworkers of America, AFL–CIO–CLC (the Union); that the Union responded by requesting an examination of Respondent's financial records and auditor-verified books and records, which Respondent refused to furnish; that by reason of such refusal, and by reason of Respondent's ''overall acts and conduct,'' Respondent failed to bargain in good faith and thereby violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), causing the employees to go out on strike on March 23; and that Respondent's rejection of the Union's unconditional offer to return to work violated Section 8(a)(1) and (3) of the Act. Respondent admits declining to reinstate the strikers but denies any wrongdoing or statutory violation.

The parties were afforded full opportunity to be heard; to call, examine, and cross-examine witnesses; and to introduce relevant evidence. Posthearing briefs have been filed by the General Counsel and by counsel for the Respondent.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed herein, I make the following

FINDINGS OF FACT

I. JURISDICTION

There is no issue as to jurisdiction, Respondent's answer having admitted the pertinent jurisdictional allegations. Accordingly, I find that at all times material, Respondent was and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union was and is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*[2]

Respondent, a New York corporation, is a subsidiary of Superior Products, a family-owned corporation based in Detroit, Michigan. It manufactures concrete pipe at several locations in the State of New York. Nicholas Melfi is president of the corporation and Timothy Vanderpool is the manager of its East Syracuse facility. Since 1957, Respondent has recognized the Union as the representative of its East Syracuse employees in the following appropriate unit:

> All employees of the Respondent at its East Syracuse, New York facility; excluding all superintendents, assistant superintendents, foremen, professional employees, quality control employees and office clerical employees.

Well before March 20, the expiration date of the last collective-bargaining agreement, Melfi and the Union commenced negotiations for a new contract. They met four times—on March 10, 16, 18, and 20. At the opening session on March 10, each side presented a set of proposals. The Union wanted a large wage increase. Respondent demanded concessions including steep cuts in wages and other compo-

[1] All dates are in 1987 except as otherwise stated.

[2] The matters narrated in this decision without evidentiary comment are those facts found by me on the basis of admissions in the answer, data contained in the exhibits, stipulations between or concessions by counsel or parties, undisputed or uncontradicted testimony, and in instances where conflicts in the testimony did not warrant discussion, the testimony which I have credited.

nents of the economic package. The employees were earning $9 per hour under the existing contract. Initially, Melfi wanted to regroup the job classifications into a group A, starting at $6.50 an hour, and a group B, starting at $6; cancel 8 of the 12 paid holidays; cut vacation time; eliminate time and a half over 8 hours, Sunday double time and reporting time;[3] eliminate one of the two coffeebreaks; eliminate some contract language he thought was unnecessary; require the employees to assume 50 percent or more of the cost of their medical insurance; and make various changes in contract language. The first and second negotiating sessions were held at a Holiday Inn, and the third and fourth sessions were held at the Union's offices. At all of the meetings, the Union was represented by George Prenatt and an employees' negotiating committee. Melfi acted for Respondent at the first three meetings and, at Prenatt's suggestion, appeared with his attorney, James C. Hoover, at the fourth meeting. At that fourth meeting, the union negotiators were joined by Richard Knowles, who was introduced as the Union's insurance and company benefits specialist.

At the fourth session, Respondent presented what Melfi termed its ''best offer'' and requested the union negotiators to present it to the membership at a meeting which they had scheduled for the following morning, Saturday, March 21. They did so. The employees unanimously rejected it and went out on strike the following Monday morning, March 23. The parties met with a Federal mediator on June 25, and though no progress was made toward settling the strike, the Union and Respondent on their own reached an agreement settling the unfair labor practice charge which had been filed by the Union on March 25, in Case 3–CA–13724, which alleged violation of Section 8(a)(5) by reason of Respondent's refusal from and after March 16 to permit the Union to examine the Company's financial records. The charge also alleged surface bargaining on the part of the Company. (The Regional Director approved the settlement but revoked his approval on October 9.)

On July 30, the Union made an unconditional offer to return to work on behalf of the striking employees. Though there had been 19 employees in the bargaining unit when the strike began, the Respondent replied that no positions were available at that time and directed employees wishing to return to work to fill out application forms at the Company's personnel office. There were no openings because Respondent had begun hiring replacement employees immediately after the commencement of the strike, promising them permanent employment. Some replacements were hired after the date of the Union's offer. On August 24, more than 3 months after it had made the unconditional offer to return to work, the Union filed the charge in Case 3–CA–13932, which alleged discrimination on the basis of Respondent's refusal to reinstate the strikers.

[3] Reporting time was pay for 4 hours for occasions when employees came in and had no work because there was no work for them or because there was an equipment breakdown.

B. *Refusal to Furnish Financial Information*

1. Statements attributed to Melfi and Hoover; Union's demand for financial and cost data

The testimony is in sharp conflict as to whether circumstances existed which entitled the Union to inspect Respondent's financial records. The General Counsel attempted to prove that Nicholas Melfi made statements during the negotiations indicating that Respondent was financially unable to meet the Union's economic demands. He adduced testimony to the effect that Melfi repeatedly demanded extensive concessions and asserted, whenever asked to explain why these were necessary, that concessions were needed to meet competition, that the Company could not afford to meet the union demands and that the Company was losing money. Similar statements are claimed to have been made by Hoover at the final negotiating session. Prenatt testified that Melfi emphasized the Respondent's financial inability to meet the union demands from the very beginning, commenting, with a shake of the head, when he saw the union proposal, ''Boy! We're not going to be able to afford this.''

Prenatt testified that Melfi opened the first meeting by taking an hour to read a prepared statement in which he declared ''that he was there to bargain in good faith and that the Company was losing money, that they could not afford to meet our demands and that we had to be competitive with the other—I think he said we had five other plants that were nonunion plants, and to get down in line with them he had to ask for concessions.'' Prenatt responded that he had no problem bargaining with respect to concessions, but International policy required companies seeking concessions to provide substantiation. He therefore asked permission to examine company financial records. Melfi refused on the ground that the Company was ''a family-owned business, his private concern.'' Prenatt asserted that this exchange was repeated, almost verbatim, many times throughout the four bargaining sessions and on every occasion when Melfi was pressed to explain the need for concessions. Prenatt emphasized that at each of the four meetings, Melfi (and at the fourth, Melfi and Hoover) repeatedly made two distinct statements: that the Company could not afford to meet the union demands and that the Company was losing money. As an example, he cited Melfi's comment on the Union economic proposals at the second meeting that ''he couldn't pay them, the company was losing money, and I asked him to open up the books again and he didn't want to open up the books because the answer he gave me at that time was simply it was a family owned concern and he wasn't going to do that. . . .'' Prenatt assured Melfi that if he demonstrated that the Company was in difficulty, the employees, many of whom had worked at the East Syracuse plant for many years, would give him whatever was needed to keep the plant open. Melfi nevertheless adhered to his position that the Company's financial records were private.

The fourth meeting began with the parties' review of their respective positions. Knowles testified:

> Q. What was stated with respect to what the company position was?
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> A. The company was claiming that they were in bad economic shape, they couldn't afford to pay the union's demands, they had to have the give-backs. And in response to a question that they would not open their books, as they had stated before.

Bobby Marshall, a member of the employees' negotiating committee, testified that Melfi repeated the formula at every meeting, and during discussion of practically every item of the contract, and that Hoover repeated it at the fourth meeting. He claimed it was repeated each and every time Prenatt asked for the books to be opened up. Also, according to Marshall, Melfi used the word ''final'' rather than ''best'' in his ultimatum at the end of the fourth meeting, and refused Prenatt's request for a 1-year extension of the expiring agreement.

In an affidavit, Marshall stated:

> We started going over the proposal item by item. For example, when we asked about the 40 hours of work before we got time and a half, Mr. Melfi said that he needed it, he had to drop us to compete with his competitors. He was crying poverty and economy. After this kept being said time and again—maybe halfway through. George Prenatt . . . asked Melfi to open up the books to show where you need concessions and we would see what we could do. Mr. Melfi gave a flat out no. He said it was a family owned business, it was a private company and he didn't have to open his books.

Melfi, on the other hand, testified that he read his prepared opening statement at the beginning of the first meeting verbatim from a prepared memorandum which set out Respondent's position succinctly: competitive new products had cut into the market and Respondent faced intense competition from several nonunion concrete pipe producers who operated with low labor costs and freedom from union contractual restraints. He formulated the basis for his negotiating demands as follows: ''To survive in today's market we have got to be able to be competitive, and to be competitive, wage rates must be lowered.'' He testified that this was the position to which he adhered throughout the four negotiating sessions. While he conceded that his opening remarks may have contained some comments which did not appear in the memorandum, he denied emphatically that at any time he said that the Company could not afford to meet the union demands or that the Company was losing money.

I attach great significance, however, to the fact that the union demand actually embraced both a request for financial disclosure of a general nature and a request for data relating to labor costs as they affected Respondent's cost of production. Prenatt had explicitly based his demand for access to Respondent's books on a policy of the International requiring financial disclosure in all negotiations in which the employer demanded concessions. Two days after the strike commenced, the Union filed an unfair labor practice charge herein alleging failure to furnish information. In settlement of that proceeding, Respondent submitted consolidated profit-and-loss statements for 1985 and 1986. The Union rejected the data submitted, consisting of profit-and-loss statements, on two grounds, that they were not certified and that the supporting cost data had not been supplied. There is no question but that Prenatt, in compliance with International policy, had demanded information which was primarily relevant to the question of the need for concessions on the basis of labor costs. Thus, whether or not Melfi and Hoover made any statements indicating that the Company was in financial distress, production of cost data by Respondent was required.

2. Findings

It is a striking fact that the recitations by the General Counsel's witnesses of the remarks attributed to Melfi and Hoover were uniform and consistent, while their testimony varied markedly on other aspects of the case. For example, they differed as to whether Melfi termed his last proposal his ''best'' or his ''final'' offer, on the length of the period for which the Union requested a contract extension, the point of time in the fourth meeting at which the request was made, who made the request on behalf of the Union, and whether Melfi repeated the statement about the Company's financial inability to meet union demands at any time during the second meeting. They also contradicted each other. For example, Prenatt testified that Melfi did not repeat the formula (concessions required to meet competition) during the second meeting, while Bobby Marshall testified that he did.

Prenatt's testimony was marked by a tendency to furnish answers which were unresponsive, evasive, implausible, and irrelevant. For example, he asserted that he could not recall what he had said at a meeting with the Federal mediator on June 25 that provoked Melfi to call him a liar, suggesting that Melfi's outburst had not resulted from his attribution of remarks to Melfi regarding the Company's financial condition, though the context indicated that that was clearly the cause. He testified that he could not, and therefore did not, keep notes of the meeting with the Federal mediator because it was not his meeting and that he therefore could not substantiate his claim that Melfi told the mediator that the Company could not afford the union proposals, a contention which remains uncorroborated either by his notes or by testimony from other members of the union negotiating committee who attended the meeting with the mediator. Another example is his assertion that the second meeting, held on March 16, lasted 2 hours, while Hoover testified, credibly, that it lasted between 5 and 6 hours and broke up at midnight.

Prenatt's testimony was inconsistent in some respects. He testified initially that the first hour of the first meeting was consumed by Melfi's reading of an opening statement; later he conceded that it took Melfi a somewhat lesser period of time to read it. At one point in his testimony, he flatly denied that Melfi called him a liar because he told the Federal mediator that Melfi said the Company was losing money and could not afford to pay, having, as noted above, had difficulty remembering why Melfi did so; later he conceded that that had been the reason for Melfi's outburst. In his initial account of the fourth meeting, Prenatt did not mention any request for an examination of Respondent's books, but in response to a question which I put to him, he testified that he made the request three or four times during that meeting and, over the course of all of the meetings, repeated the request some 20 times.

Prenatt's testimony on key points is not supported by his meeting notes or by accounts he gave in affidavits dated

March 30 and April 1 which he furnished to a Board investigator. These quote Melfi as making statements in line with the statements which Melfi and Hoover concede having made, with one unimpressive exception. The affidavit dated March 30 states:

> At the outset Melfi stated that the company intended to bargain in good faith. He went on to say there are a lot of non-union plants doing the same work as we do and we have to compete. They pay lower wages and less benefits. We need concessions. I responded that it was the union's position and International's policy that if and when any employer is in need of concessions, we see no problem in that; that the Steelworkers have demonstrated to the steel industry and many small employers that if they are willing to open up their books to the people from Pittsburgh and they see that there is a need for concessions you will get them the same as the rest have gotten them. His reply was that this was a family-owned business and we will not not open our books up. I said that this doesn't seem reasonable: that if you're losing money, let us see the books. He again stated that they definitely would not open up their books. We then presented Mr. Melfi with our non-economic proposals, copy attached.

A supplemental affidavit by Prenatt, sworn to April 1, recounts the discussion on the wage and benefit package, including medical insurance, for the class A and class B employees. Prenatt states:

> I said you open up your books to our people in Pittsburgh and if your books substantiate that you need relief you'll get the same consideration as we gave the big basic steel plants—we gave them concessions three different times to keep the plants open and save jobs. I went on to mention that there were also many small plants that we helped save. . . . Again he repeats that it's a privately owned concern and they were not gonna open up their books.

When Prenatt asked Melfi why he wanted to delete medical coverage after layoff, the answer was still restricted to the need to be competitive:

> I said if your answer is to be competitive then open up the books. His answer to that again was no.

In the discussion of sick days, according to the affidavit:

> He said his competitors didn't have them, it was a burden on him. Then again I said if you say you're losing money open your books. He said that he was not going to open the books.

Not until he describes the fourth meeting does Prenatt quote any statement by company representatives indicating financial hardship. Up to that point the descriptions or quotations of all previous discussions of financial disclosure mentioned in the affidavit showed that references to financial hardship were made by Prenatt himself, not by Melfi. In the supplemental affidavit, Prenatt asserted that at about 5:30 p.m. in the fourth meeting Melfi and Hoover had a caucus, and then Hoover spoke: ''The lawyer opens by saying that we gave you our final offer, we are in bad financial shape. You can take it or leave it.''

Attached to Prenatt's supplemental affidavit are notes signed by him and dated March 20 and 30, which quote ''the company'' to the following effect: ''Company walked out on us at 6:00 p.m. They said that's our final offer, take it or leave it. Go out and organize our competitors.''

A statement to the following effect appears on page 10 of Prenatt's supplemental affidavit:

> Nick's comments are taken down in the attached notes of Dick Knowles—''bad economic shape, can't afford—won't open up books.'' The union then asked for a caucus. We discussed the fact that the Company wouldn't give us facts or figures—kept saying bad times, losing money, can't afford—no proof given.

Prenatt's notes present troublesome questions. Prenatt testified that at the fourth meeting, each time Melfi said that competitors were not paying their employees according to the scale the Union was demanding, he added that the Company had to be competitve, could not afford it, and was losing money. Though the meeting lasted 5-1/2 hours, Prenatt, in his supplemental affidavit, made no mention of economic hardship until an extremely late point in the affidavit, and then only refers to Knowles' meeting notes (not his) and the statement which he attributes to Hoover.

The fact that the affidavits recite statements as having been made, such as they are, is not at all persuasive on the proposition that they were made; they are in that regard nothing more than self-serving statements. However, the affidavits undermined Prenatt's credibility. They were patently needed to elicit his testimony and it seemed clear to me that he could not have testified without reference to them. And what is omitted from the affidavits speaks volumes. With the solitary exception of the statement which he attributes to Hoover, Prenatt did not, either in his notes or in his affidavits, ascribe an explicit statement that the Company was having bad times, losing money, or could not afford to meet union demands, to any specific person, Melfi or Hoover or Vanderpool, nor does he assert that such statements were made at any specific times, in any specific meetings, or in response to any specific demands or statements by the union negotiators.

Prenatt insisted that the statement by Melfi about losing money, which does not appear in his affidavit, was contained somewhere in his meeting notes, but it is not there. What the notes of the first meeting do contain are references to discussion of work hours, holidays, seniority, safety and health matters, grievance procedure, vacations, and numerous other matters and details within these categories, conveying a picture at variance with Prenatt's assertion that it was a perfunctory introductory meeting. He was vague, on cross-examination, as to what was discussed in the first meeting, in spite of the notes. But he asserted that his meeting notes contained everything of importance, because it was his practice to set down the items that were important. That would suggest that inasmuch as the notes do not indicate that any statement was made by Melfi about economic hardship in the course of the 2 hours that the first meeting lasted, and inasmuch as any such statement would seem to have been sufficiently important to be included in his notes if it had, in fact, been made,

that no such statements were made. I do not credit Prenatt's explanation that he did not always note down such statements by Melfi because Melfi was always saying the same thing. Not only is that implausible, considering the importance of such an utterance, but the argument has no standing in a situation where there is not a single instance, other than the Hoover statement, in any of the four meetings, of the remarks being set down with specificity and attributed to a particular person at a particular point in the meeting in either his meeting notes or his affidavits. The fact that the affidavits were made less than 2 weeks after the last meeting underscores the significance of the omission.

The Union's notes of the meeting on March 20 contain a description of Respondent's response to the Union during discussion of its demand for wages increases which on its face indicates that it should not be credited: ''Can't pay and are losing money. Union answer, open up your books. Company says no.''

There is a reference to inability to pay and losing money, but without attribution, though the Respondent was represented at this meeting by Melfi, Vanderpool, and Hoover. There is then a reference to a purported statement by the ''company'' that it would not open up the books, again without attribution, and also seemingly in a vacuum, because there is no reference to anyone having demanded access to the books. The Union is referred to as quoting Melfi's remarks about ''you can't afford to pay and . . . you're losing money and got to be competitive.'' But that is the Union talking, not Melfi. The Company's statement on return from the 5:30 p.m. caucus is stated to have been as follows:

> Company returned. Their statement was we gave you our final offer we are in bad financial shape and can't afford it take it or leave it.

Knowles' notes of the meeting of March 20 were attached to an affidavit which he gave to a Board investigator on April 14. In it, he stated that his recollection of the opening part of the meeting was as follows:

> After some initial remarks between George and Nick, George asked the Company to open their books. Nick said that as he had stated before, he wouldn't open the books; I believe the lawyer said something about them being a private company and their books not being open to review. That's my recollection of the opening part of the meeting.

In describing the circumstances of the presentation of the Company's ''best offer,'' Knowles quoted statements as to financial hardship in such a fashion as almost to amount to a disclaimer of their having been made:

> Nick said that this is our best offer. I told you that we are in deep financial shape *or words to that effect*. I said that you put back on the table things that were off. [Emphasis added.]

Not only does Knowles fail to quote these critical remarks with specificity, it appears that Knowles did not respond to Melfi by demanding an inspection of the books, which would have been the only appropriate response to such a remark by Melfi. Instead, he reverted to matters Melfi wanted to discuss again and which the Union had considered settled. Such a response leads me to conclude that Knowles attributed no importance to any statement Melfi made regarding the financial condition of the Company at the hearing, for the simple reason that the only statements made were those Melfi admits having made.

Knowles described another nonsequitur:

> When they came back in, Nick said that they gave us their final offer, repeated that they were in bad financial shape, that they couldn't afford the situation we're facing. The attitude he expressed was a take-it-or-leave-it I don't recall if he actually said that. He went on with like a small speech saying that they couldn't compete with their competitors or something along that line and they have to have these concessions or their requests. *Then George broke in and starting talking about safety and health conditions. Some committee members also broke in telling the Company they weren't being up front and honest. I believe Coleman said that he'd worked there 30 years and why were you doing this. There were comments that the company really didn't want a contract.* [Emphasis added.]

Conspicuously absent from this exchange is any demand for inspection of the Company's financial records. Despite Prenatt's contention that he asked for inspection times during the course of the four meetings, doing so every time the question of concessions came up, no demand ever seems to have been made on those occasions when Melfi purportedly said the Company was in bad financial shape, and I regard that as an indication that Melfi did not say the Company was in bad shape.

Knowles makes an assertion in his affidavit that he ''jumped in and gave a speech'' about the fact that time was still left to negotiate and the fact that the Company was claiming inability to pay but refusing to furnish facts and figures, and he refers to his notes of the meeting. This account, like so much of the other testimony, lacks specificity and the ring of truth. In these notes, after reviewing what was agreed to and what was still open, Knowles states that, ''*Company* stated in bad economic shape can't afford what is being asked by Union, must have give backs. Won't open books or financial records as stated before.'' (Emphasis added.) Later, Knowles' notes indicate the exchange described in his affidavit and he quotes himself as saying, in his own remarks, that the Company had been claiming inability to pay and requesting concessions without providing facts or figures to support its claims.

I seriously doubt the veractiy of the meeting notes which were purportedly made to memorialize events at the fourth meeting and I am deeply suspicious of the paucity of quotation of remarks by Melfi and Hoover which would have had to have been recognized, had they actually been made, as being of major importance. What little appears in the notes suffers from lack of specific attribution to one of the company representatives.

Knowles' testimony was not credible. He testified, backwards, that Melfi made statements of financial incapacity and that they were made in response to ''a question that they would not open their books.'' The testimony really does not make sense; if asked why he refused to open up the books,

Melfi was hardly likely to say it was because of economic hardship. Knowles was unable to testify without substantial assistance from the counsel for the General Counsel regarding the number of times Melfi said he needed concessions because of the Company's poor financial shape. He finally decided that Melfi said it between three and five times. His chronology of events was also confused, so much so that at one point he actually testified that the Union offered the Company an extension of the contract in order to give the Union a chance to examine the financial data—though the Company was still refusing to furnish any financial data. Knowles quoted Melfi, at the end, as saying: ''I told you that I couldn't afford it, couldn't afford the union's demands, we're in bad economic shape and take it or leave it.'' He does not explain how, after such a take-it-or-leave-it ultimatum, it came about that there then ensued a discussion among Prenatt, Melfi and the negotiating committee ''concerning safety and health.'' (I note, in passing, that Knowles thus places the utterance of the ''best'' offer at a point in time considerably before the end of the fourth meeting, contrary to the testimony of Prenatt and Marshall.) Knowles also quoted Hoover as saying, ''We told you we are in bad economic shape, take it or leave it. Now you can go out and organize our competitors.'' Yet, these statements are not set forth in an affidavit which Knowles furnished to a Board investigator. Then, in describing the meeting of March 20, he said only that

> After some initial remarks between George Prenatt and Nick Melfi, George asked the Company to open their books. Nick said that as he had stated before, he wouldn't open the books; I believe the lawyer Hoover said something about them being a private company and their books not being open to review. That's my recollection of the opening part of the meeting.

Knowles' notes appended to his affidavit attribute significant statements regarding financial condition to Respondent, but these do not describe what happened in a negotiating session, but what happened in a caucus of the union negotiators. In that caucus, somebody reported: ''Company won't give us facts or figures kept saying bad times, losing money, can't afford—no proof given.'' The caucus note does not say who said that to whom during the caucus, or whether the remarks were attributed to Melfi or Hoover or not attributed at all. Most of Knowles' notes relate to the caucuses, not to the negotiations. There is no entry in his meeting notes attributing to either Melfi or Hoover, specifically, at any time during the fourth meeting, a specific statement along that line.

I note further that according to Knowles' affidavit, Melfi had presented the last offer made by the Company during the negotiations, toward the end of the fourth meeting, with the statement, ''This is our best offer.'' In the affidavit, Knowles' stated that he could not recall if Melfi actually said ''take it or leave it.'' At the hearing, he testified that Melfi did say it. Prenatt, however, attributed the remark to Hoover.

It is also noteworthy that Marshall does not support Prenatt's testimony that he demanded inspection of the books practically from the beginning of the first meeting. According to Marshall, Prenatt made the demand halfway through the meeting after Melfi made repeated assertions of poverty. Marshall testified that Melfi used the words ''poverty'' and ''economics,'' but he was totally unable to supply the context in which they had been used and finally asserted that they had been used at the third meeting. His testimony respecting Melfi's language was jumbled, confused and incredible. He said he told that to the Board investigator, but his affidavit does not quote Melfi's exact statement. Marshall contradicted himself as to the manner in which his affidavit had been prepared, at one point testifying that he responded to questions put to him by the Board investigator and asserting, at another point, ''I just told him what I had to say.''

When Melfi testified, he admitted that at various points in the negotiations he may have made statements in addition to those reflected in Vanderpool's notes or in the prepared text of the opening remarks he made at the first session. His testimony that he may have made further comments after he read the opening statement ''practically verbatim'' does not afford a basis for insinuating, as the General Counsel attempts to do, that he either did, was likely to, or can be presumed to have gone to the extent of making statements regarding the Company's financial in ability to meet union demands. However, Melfi conceded that when he finished reading his opening statement at the first meeting, Prenatt stated the policy of the International to require examination of company books in negotiations for concessions, and that the Company had to be found to be losing money *or to have other reasons for concessions*, thus further confirming that the poverty plea was not the only basis for the Union's demand for financial information.

3. Conclusion

I do not credit the testimony of Prenatt, Marshall, and Knowles with respect to the more extreme statements of financial disability which they have attributed to Melfi and Hoover. Their attributions of the critical statements are deficient by reason of their vagueness and lack of specificity. Serious problems of inconsistency are inherent in their testimony and in the contents of their affidavits. I do not believe that on each and every occasion when concessions were mentioned, the Union demanded to know the reason and Melfi, in a knee-jerk reflex action set forth, invariably in the same language, stated that he had to get wages in line with his competition, he could not afford to pay the union demands and the Company was losing money. The fact that Melfi asked for concessions but refused to open the books when Prenatt asked him to prove he needed them does not automatically translate into a plea of financial hardship. The testimony that he repeatedly recited a set formula every time the subject of concessions was discussed, and that he even used the word ''poverty,'' is something which I find incredible, at least as related by these witnesses.

Even though, on the basis of all the testimony and on the basis of the demeanor of the witnesses, I do not find that Melfi and Hoover made statements that the Company could not afford to meet union demands and was in serious financial difficulty, on the basis of my acceptance of their version of what they said about the reason why concessions were needed I must find that a violation of the Act was committed. In the form in which Melfi quoted it, the ability to compete in the market, as the market is presently constituted, was limited to the ability of the Company to survive. Expression of a desire to improve ability to compete can be made for more than one objective: as a profit incentive or for the pur-

pose of surviving, which is the one for which Prenatt asserts it was made. Melfi conceded that in his own testimony: he told the Union at the outset that he had to improve his ability to compete in order to survive, thus linking the Company's future as a viable business concern to the granting of concessions. It is not even important whether he said it repeatedly during the meetings. Having said it once, at the very outset of the negotiating sessions, Melfi did not have to use the word again. Every time thereafter that he asserted that reductions in wages and benefits were needed in order to enable the Company better to compete, the threat to the Company's survival was automatically incorporated into his utterance. He made the point right at the outset.

I conclude that Respondent was under an obligation to produce sufficient financial information to enable the union properly to represent the employees' interests in the contract negotiations by making an intelligent assessment of the Employer's need for concessions and the potential need to revise its wage demands. Melfi and Hoover concede that Prenatt and other union negotiators requested examination of the Company's books in connection with Melfi's demands for concessions. Hoover testified that Knowles, for example, in the course of making a proposal regarding wages toward the end of the final meeting on March 20, told Melfi and Hoover ''that the company was asking for a lot and that he felt that the company should open their books, and that if there was a strike that it would, the union would consider it to be an unfair labor practice strike.'' According to Hoover, Prenatt's request for the books was on the same basis: ''I remember Mr. Prenatt saying that, 'You want cuts, you ought to open your books.' And I remember Mr. Knowles saying, 'You're asking for a lot. You ought to open your books.' I don't recall that it was tied to, 'You are losing money.'''

I do not believe there can be any doubt that Melfi well understood that concessions could not be granted without financial disclosure and he knew that the information sought by the Union related to labor costs. Prenatt cited the policy of the International in response to Melfi's lengthy opening statement. Later events show that this remained an important requirement of the Union throughout. Edward Ghearing, a union research economist, testified that in May or early June, he had telephone discussions with Hoover in which it was agreed that a profit-and-loss statement audited by an outside auditor would be provided *along with the supporting cost data*. Ghearing testified that after he reviewed the material Hoover submitted, he telephoned Hoover and told him that the information furnished was not in accordance with the agreement, because it was not prepared by an outside auditor and because it lacked supporting cost details. Hoover conceded that he started his conversation with Ghearing by saying that income tax records were not relevant because a consolidated income tax return had been filed and Ghearing agreed with him. Hoover's testimony makes it obvious that Prenatt was demanding access to financial records for reasons other than the possibility that the Company was losing money. The information he needed was different, but no less essential. See *Harvstone Mfg. Corp*., 272 NLRB 939 (1984); *Hiney Printing Co*., 262 NLRB 157 (1982), enfd. 733 F.2d 1170 (6th Cir. 1984).

In Ghearing's absence, Paul Kennedy, another staff analyst, offered to obtain comparative pay data in the industry, but he was not requested to make an analysis by Mickey Berger, who had replaced Prenatt as the union staff representative. Hoover has pointed to this circumstance as an indication that the Union sat on the matter until after the Union's demand for reinstatement of the strikers was refused, and only then considered it a ground for an unfair labor practice charge. However, on July 21, while Ghearing was away on vacation, Kennedy sent Berger a lengthy assessment of the financial condition of Respondent on which the Union could have acted if the Company's overall financial condition had been its only concern. It lacked the cost data, however, and although the Union did not then make an issue of that omission, that data had been requested by Ghearing and the failure to supply it was one of the reasons he gave for considering the informational submission inadequate. Patently, its omission left the union negotiators in a position in which they could not negotiate intelligently. (I note, in addition, that Berger testified that Kennedy's letter was intended to be informational and not for use in the negotiations, a limitation that is consistent with the request for, and the failure to receive, cost data.)[4]

(I note also that, if general financial disclosure had been the Union's only need, the data presented was adequate to enable the Union to make a decision whether or not to grant concessions. Kennedy reported to the local that the returns on the sales dollar were down in 1986, but nevertheless the returns on the sales dollar were ''very respectable.'' He concluded, ''It would appear that this Company does not suffer an economic disadvantage as far as employment costs are concerned, when compared tothe majority of its competitors.'' The Union did not need to have the statement audited in order to perform its function as the representative of the employees. It demonstrates that the Union's concern was not with overall financial condition of Respondent, but with economic disadvantage claimed by Respondent on the basis of cost factors.)

The Respondent's adamant demand for steep concessions made it necessary for the Union to determine whether its own bargaining demands were reasonable, whether those of the Respondent fairly reflected the needs of the Respondent, and whether it was therefore in the best interests of the employees in the bargaining unit which the Union represented to agree upon concessions and forgo wage increases. Its demands for access to financial data were within the well-settled rules that any labor union is entitled to receive from an employer information relevant and reasonably necessary to the proper performance of its duties in negotiating and administering collective-bargaining agreements in an intelligent manner, which information need only be probably or potentially relevant and useful (utility and pertinency to be deter-

[4] Kennedy's letter of July 21 apparently was an attachment to an affidavit given to a Board investigator by Berger. Respondent's counsel has complained of impropriety on the part of the General Counsel because the letter was not attached to Berger's affidavit when it was furnished to counsel for his review prior to his cross-examination of Berger. I find no impropriety on the part of the counsel for the General Counsel, who had promptly turned over the affidavit from from the file, in the form in which he had received it from prior counsel in charge of the case. When Respondent's counsel read the affidavit and became aware that there had been an attachment to it, and called for its production, it was located and produced by counsel for the General Counsel. There was no significant delay, no prejudice, and no impropriety.

mined under a liberal discovery-type standard, relevance being presumed as to information requests regarding unit personnel). *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956); *Wright Aeronautical Division*, 145 NLRB 152 (1963), enfd. 347 F.2d 61 (3d Cir. 1965); *Westinghouse Electric Corp.*, 239 NLRB 106 (1978), modified and enfd. 648 F.2d 18 (D.C. Cir. 1980). It is noteworthy that even when relevance must be demonstrated, it is sufficiently established by a showing of probable need for the information requested in the particular circumstances. See *Safeway Stores*, 252 NLRB 1323 (1980), enfd. 691 F.2d 953 (10th Cir. 1982); *General Motors Corp*., 243 NLRB 186 (1979), modified and enfd. 648 F.2d 18 (D.C. Cir. 1980); *Bendix Corp*., 242 NLRB 1005 (1979).

Though the Union's demand in this case met these requirements, the only response Melfi ever made to the Union's oft-repeated requests was that the Company was a family owned business and company policy precluded disclosure of the financial records. In the circumstances, that response was inadequate because, the demand having been proper, it was incumbent upon Respondent either to provide the information or set forth an adequate reason why it was unable to do so (not why it did not want to do so). *Kroger Co*., 226 NLRB 512, 513 (1976).

The profit-and-loss statement which Respondent finally provided on June 25 constituted an inadequate production of information, but not for the reasons stated initially by the Union. I have no problem with the fact that it was not certified, but with the fact that it did not give the Union information which it needed to bargain intelligently. An employer need not make information available in the precise form requested, so long as it provides usable information within a reasonable time and at at reasonable place. *United Aircraft Corp*., 192 NLRB 382, 389 (1971), modified on other grounds 534 F.2d 422 (2d Cir. 1975).

The principle is that assertion by an employer of financial inability to meet union demands creates an issue of the employer's financial condition and entitles the union to examine its financial records in order to bargain knowledgeably. Respondent mistakenly relies upon the obverse of that proposition and argues that its meticulous avoidance of such statements operated to excuse production of its books and records. However, such production can be made necessary by other statements or circumstances. The numerous decisions that records must be produced when an employer asserts financial hardship are, essentially, merely an application of the general rule that a union is entitled to verify the employer's contentions to the extent that verification will facilitate collective bargaining:

> Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. [*NLRB v. Truitt Mfg. Co*., 351 U.S. 152, 153 (1956).]

Any contention, therefore, which affects the manner in which bargaining is conducted may entitle a party on either side to verification. An employer may be required to produce records that demonstrate the existence of the condition that it claims actually exists. In *International Telephone & Telegraph Co*., 159 NLRB 1757 (1966), enfd. in pertinent part 382 F.2d 366 (3d Cir. 1967), cert. denied 389 U.S. 1039 (1968), an employer claiming that the wage scale handicapped its bidding was required to substantiate its claim by making available the records that would have shown that particular fact (159 NLRB at 1790). In *Empire Terminal Warehouse Co*., 151 NLRB 1359 (1965), enfd. 355 F.2d 842 (D.C. Cir. 1966), the employer told the union that its business was lucrative and profitable but that the union's demands put it at a competitive disadvantage. Economic hardship was not suggested either directly or indirectly. It supplied the union with an industrywide wage survey. The union's demand for general access to the company's financial records was denied on the ground that the employer had proved its point by supplying the wage survey. See also *Advertisers Mfg. Co*., 275 NLRB 100 (1985), and *Atlanta Hilton & Tower*, 271 NLRB 1600 (1984), holding that no particular language is needed to express inability to pay, but that a finding that it had been expressed had to be based on words and conduct which were specific enough to convey such a meaning.

Information that is pertinent to a particular union purpose must be furnished. What has to be furnished depends on the need. In a wide variety of cases, pertinent records showing needed information of all sorts has been directed. See *Doubarn Sheet Metal*, 243 NLRB 821 (1979) (data pertinent to single-employer relationship between employer and another company); *NLRB v. Leonard B. Hebert Jr. & Co*., 259 NLRB 881 (1981), enfd. 696 F.2d 1120 (5th Cir. 1983), and *Associated General Contractors of California*, 242 NLRB 891 (1979), modified on other grounds 633 F.2d 766 (9th Cir. 1980) (information relating to persons outside the bargaining unit represented by the union); *Boeing Co*., 182 NLRB 121 (1970) (information needed to process grievances by evaluating merits of claims); *ACF Industries*, 234 NLRB 1063 (1978), enfd. in relevant part 596 F.2d 1344, 1353 (8th Cir. 1979) (employer laying off workers over a period of time greater than 6 months required to produce list of subcontracts for the previous 2 years).

Respondent's contention that the granting of the union demands and the Union's own failure to grant concessions would affect Respondent's ability to meet competition, even though carefully phrased to avoid any implication of general financial distress on the part of the Company, merely served to restrict the extent of inspection of records to which the Union might be entitled. It did not deprive the Union of the right to demand verification of Respondent's claim of inability to compete because of the wage scale. The Union was entitled to probe other cost factors to determine if Respondent's asserted competitive disadvantage arose from its labor costs primarily, and that data was explicitly requested, according to the uncontroverted testimony, the documentary evidence and Melfi's own admission.

Melfi, in his testimony, conceded that the Union could not know for sure about the various levels of expense, or whether certain of its own or Respondent's demands were too steep, without seeing the books. The Union certainly had no basis for determining if concessions were appropriate with regard to wages. Melfi conceded that he wanted to compel

the Union to take his word for the proposition that wages were the cost item that had to be altered in order to enable the company to compete effectively—which is precisely what the Supreme Court, in *NLRB v. Truitt Transportation Co*., supra, said a union is not required to do.

Melfi's assertion in the course of his testimony that the Company's other costs were lower than those of its competitors was not a self-evident proposition and remained, at the hearing, an open question; he was unable to quote any of the prices paid by competitors so as to permit comparison with those paid by Respondent and certainly never attempted to do so during the negotiations, just as he never offered the profit-and-loss statement to the Union during the negotiations. This case falls under the general rule that an employer must furnish the Union with the information it needs to do its job. This is not a case restricted to the narrow rule of the ''poverty plea'' which, as I have noted, are basically one application of the general rule to a specific circumstance.

Accordingly, I find that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the cost data to the Union.

C. *Failure to Bargain in Good Faith*

The indications that Melfi pursued a course of negotiation designed to frustrate the attainment of a new collective-bargaining agreement are numerous and substantial. He adhered inflexibly and adamantly to extreme economic proposals while refusing to afford the Union access to company records which might have shown the necessity for them. His statements and actions tended to denigrate the position of the Union as the collective-bargaining representative of the employees. He presented manifestly unacceptable proposals, insisted on concessions which would bring wages and benefits down to the same level as those obtaining in nonunion companies, demanded that the union negotiators place his last proposal or ''best offer'' before the membership for a vote, broke off negotiations after only four meetings, and unilaterally implemented his proposals after hiring nonunion replacement workers.

1. The nature of Respondent's proposals

Bargaining proposals which are so intrinsically unreasonable or severe as to invite rejection, considered in the context of all the other circumstances surrounding negotiations, may be found to have been designed to frustrate, rather than advance, the negotiations. Melfi's proposal to cut wages by one-third is the type of bargaining proposal which might reasonably be expected to be accompanied by a reasonable explanation of its necessity and any verification that is available. Respondent's explanation—that serious concessions were needed in order to place Respondent's own several facilities on a parity with each other and aall of them on parity with nonunion shops—and Melfi's refusal to grant access to company records which supposedly justified such demands, amount to a rejection of the collective-bargaining process and denigration of the Union. At the same time, Melfi advanced other proposals which contributed relatively little, if anything, to the enhancement of Respondent's financial well-being or competitive position but invited resentment and hostility on the part of the employees, such as Respondent's proposal to eliminate coffee breaks for employees who, under normal conditions, worked overtime into the early evening hours, and Respondent's bickering over matters such as military leave, that actually were already settled by provisions of law and therefore beyond the parties' contractual discretion. Consequently, I do not accept Melfi's repeated assertions of Respondent's need to be competitive as having been put forth in good faith.

2. Adamancy and breakoff of negotiations

At 6 p.m. on March 20, with 6 hours still remaining before expiration of the collective-bargaining agreement, Melfi presented his ''best offer'' and demanded that the Union present it to the employees for a vote. He and his lawyer then left the meeting. They broke off the talks though Prenatt and Knowles expressed their wish to continue negotiating, progress had been made on many contract items, the Union responded with counterproposals to the ''best offer,'' and there was no apparent reason why talks could not continue. Respondent's ''best offer'' essentially repeated the basic demands of its intractable bargaining position on wages and benefits, which the Union had already said it could not accept without information regarding cost factors, and Respondent then unilaterally proceeded to implement its proposals despite the lack of an impasse in good-faith bargaining.

The testimony regarding the termination of the fourth meeting and the breakoff of the talks shows that the company would not budge on the concessions issue. It is conceded by Melfi and Hoover that Melfi was determined to negotiate for concessions and would not enter into any agreement which did not provide for them. Melfi testified that no response was made to the Union's final counterproposals at the last meeting. As Hoover put it, ''We saw nothing to be gained based on the fact that the union was not willing to enter into concessions, that's true.'' Hoover testified that there had been no discussion among the company representatives as to what wage level they would agree to as an acceptable alternative to the concessions being demanded by the Company. There was discussion only ''that we wanted to obtain substantial concessions.''

Melfi and Hoover point to corresponding adamancy on the part of the Union in pressing for wage increases to the very end, but that is a point which cannot be considered independently of Respondent's refusal to furnish the Union with the information it needed to bargain in an intelligent fashion. If the Union adhered to a bargaining position which in the opinion of Melfi made an agreement impossible, then the failure of the negotiations was preordained by Respondent's own failure to make cost data available to the Union.

There is nothing in the history of the first four sessions to indicate that an agreement was out of reach except for Respondent's insistence upon a one-third wage reduction and steep cuts in other benefits while refusing to give the Union an informational basis on which to judge the reasonableness of the demand. A great deal of progress had concededly been made in the four sessions and counterproposals were being made by both sides until the last moments of the fourth session. Four meetings, during the course of which the Union was deprived of needed and relevant information, cannot be considered adequate time to respond to Respondent's proposals and 10 or 15 minutes was certainly not time enough to give adequate consideration to Melfi's announcement of his

intention to implement his proposals unilaterally. His doing so therefore violated the Act. *M. A. Harrison Mfg. Co*., 253 NLRB 675, 676 (1980), enfd. 682 F.2d 580 (6th Cir. 1982).

At the first meeting, according to Melfi, the parties exchanged proposals, discussed all of the Union's noneconomic proposals and then reviewed a number of matters which included pension, wages, severance pay, military leave, alcohol and drug abuse, and safety and health issues. Agreement was reached on matters such as job postings. Prenatt testified that the meeting lasted 2 hours; that they merely exchanged proposals, since Melfi wanted time to study the union proposals, and that Melfi made a lengthy opening statement which took an hour to read.

During the second and third meetings, proposals by both sides relating to numerous provisions of the expiring contract were adopted, modified, or withdrawn. These related to a wide range of topics, including wage rates, concessions, reporting time, performance of unit work by supervisors, interplant transfers, job postings, disputed discharges, funeral leave, job classification rates, leaves of absence, vacation, rotation of employees in various departments at vacation time, compensable injury during working hours, early quitting time for personal reasons, posted work schedules, miscellaneous holiday provisions, seniority, grievance procedures, testing of employees, prorated vacations, and quitting time on the dates of the monthly union meetings.[5] Discussion of the economic proposals only began in earnest at the third meeting, the first meeting having been introductory and the second having by consent been devoted mainly to noneconomic items. But although the meetings had demonstrated that both sides were capable of agreement, concession and compromise on a wide variety of matters, Melfi was prematurely fixing the conclusion of the fourth meeting as the deadline for the discussions. He announced that effective Monday, March 23, he would implement his proposal to fix class A wages at $6.50 per hour and class B wages at $6; would reduce the number of holidays to seven; would bill 50 percent of the medical insurance premiums to the employees beginning April 15; and would reduce the number of sick days to 2, 1 every 6 months.

The second meeting lasted from 3 p.m. to midnight on March 16. Melfi testified that the reason for the length of the meeting was the parties' willingness to continue as long as they were able to, in view of the productive nature of the session. A spirit of cooperation and compromise seemed to exist with respect to most of the less important issues. Union proposals on which agreement was reached included military leave of absence. On company proposals, the union agreed to delete double-time pay for Sunday work and the Company agreed to withdraw a proposal for the reduction or elimination of Sunday pay and showup time. Agreement was reached reducing the number of holidays. Other economic issues were deferred to the third meeting. All noneconomic items were covered, including probationary period, safety shoes, grievance procedure response time, and job postings. The Union agreed to a provision giving management more flexibility in setting the holiday schedule. The Company and the Union each agreed to a number of proposals of the other. Using the existing contract as a frame of reference, agreements were reached on the matters covered by article III, §§ E, F, G, and H; article IV, §§ A–E; article VI, §§ A, B, D, F, H, and J: article VI, § A; article IX, §§ C and D; article XI, §§ E, F, and H; and article XVII, §§ C and G.

The third meeting started at 1:15 p.m. and ended at 6 p.m. by prearrangement. The parties reviewed the remaining noneconomic issues and then proceeded to a discussion of wages, employee classifications, and the pension plan. There was ''heavy discussion'' of concessions, especially with respect to the holiday and vacation sections. Melfi wanted six holidays out and wanted to retain only winter holidays, when the plant was shut down anyway. According to Melfi, he increased the Company's wage offer by 2 percent in the third and fourth years of the proposed new contract. There were a large number of matters agreed upon or regarding which proposals by either side were withdrawn, relating to contract article III, §§ C, D, and H; article V, §§ E and H; article X, § A; article XI, § B; article XIII, § A; article XIV, §§ A and B; and article XVII, §§ B, D, and F. Agreements and withdrawals embraced matters such as military leave, supervisory work in emergencies, reduction in showup time, advance notice of overtime work, funeral leave, vacation, disciplinary action for absenteeism, and extra pay for breakfast and late-hour work. According to Prenatt, however, the third meeting was largely devoted to discussion of various items of contract language that Melfi wanted removed, some of which the Union agreed to take out. The Company withdrew some of its demands and made counterproposals.

The fourth meeting, the only negotiating session attended by Hoover, took place on Friday afternoon, March 20, and lasted from 1 to 6 p.m. Both the Company and the Union made counterproposals. Matters discussed included sick pay, the number of holidays, and the classification chart. The Company proposal, characterized by Melfi as the Respondent's ''best offer,'' provided for wage increases in the second and third years of the contract. For Hoover's convenience, the collective-bargaining agreement was reviewed from beginning to end, and the open items were noted. Prenatt read his notes to Hoover to bring him up to date. Prenatt then stated that the deep concessionary demands of the Company required opening the books, and the Union would give the Company the relief it was seeking. Melfi again recited that it was against company policy to open the books and that concessions were being sought because of the nonunion competitors' lower costs, which required Respondent to lower its labor costs. (Later in the meeting, the matter was again brought up by Richard Knowles.)

The Union insisted that the company proposal to change the vacation schedule was still an open issue, and Prenatt accused Melfi of not bargaining in good faith and putting things back on the table. It is contended that Melfi's assertion at the fourth meeting that certain matters, including vacation, were still open to negotiation shows bad-faith bargaining, but this contention is not borne out by the testimony. Melfi testified, uncontrovertedly, that there were no negotiation rules or discussions of procedure for signing off on anything agreed to and no rules that any agreement reached was permanent and unchangeable.

According to Prenatt's version of this meeting, Hoover did most of the talking. The Union caucused four times to con-

[5] The contract provisions alluded to are art. III, §§ C–H; art. IV, §§ A–E; art. V, §§ A, B, D–F, H, and J; art. IX, §§ C and D; art. X, § A; art. XI, §§ B, E, F, and H; art. XIII, § A; art. XIV, §§ A and B; and art. XVII, §§ B–D, F, and G.

sider company proposals, but reaching an accommodation was difficult in the face of repetitious verbiage from both Melfi and Hoover to the effect that, ''We can't afford it. We're losing money.'' Hoover said they could not afford it and had to be competitive, were losing money and suggested that the Union go out and organize Respondent's competitors. Hoover ultimately furnished the Union with a list of several nonunion competitors. Prenatt testified that Melfi and Hoover caucused between 5:30 and 6 p.m. and that upon their return, Hoover made the following statement: ''You've got our final offer, you can take it or you can leave it, that this company's losing money, we can't afford to pay your benefits and we've got to be competitive and that's it.'' According to Prenatt, they refused to continue with a discussion of safety matters and rejected a proposal by Knowles for an extension of the contract, refusing even to look at an extension agreement which Knowles held out to them. (Prenatt said the proffered extension agreement was for 30 days, but it was for a year. In any event, neither Melfi nor Hoover made any response to it.) They got up and left. Hoover testified that Melfi told Prenatt, ''This is our best offer and we hope that you will accept it.'' When the Union responded by making a counterproposal for substantial wage increases Melfi declared it was not acceptable and that the Company would implement certain parts of the Company's proposal on Monday morning, March 23, beginning with the proposed pay cuts, the other items to follow later. At that point, Knowles said he would agree to pick up some percentage of the medical insurance costs, cut back sick days from 4 to 2, and accept a wage increase in the next 3 years more moderate than the one demanded by Prenatt. That did not suffice to bring Melfi and Hoover back to the bargaining table.

While Melfi and Hoover dispute aspects of Prenatt's and Knowles' accounts of the fourth meeting, especially testimony that they made statements indicating that the Company was in financial distress and that Hoover used the expression, ''Take it or leave it,'' their testimony is in accord with their accounts of the meeting in several in important respects. Melfi's testimony did not go into detail respecting events at the very end of the meeting, but Hoover's testimony did. Hoover conceded that the Union called attention to the fact that the contract did not expire until midnight and wanted to continue negotiations and confirmed Melfi's testimony that the Company did not respond. He attempted to avoid an admission that the Company had refused to continue negotiating by clinging to verbiage to the effect that the Company did not respond, but his testimony confirmed that the company negotiators had risen from the bargaining table and were leaving the room. Their actions reflected the adamancy of the Company and the surface nature of the bargaining, for there is little question that the meeting ended because the concessions demanded by Melfi were not being granted by the Union. Melfi made no response to the union counterproposals. According to him, he told the union negotiators, ''You have our best offer. I'd like to see you bring it back to the membership and recommend its acceptance.'' Melfi testified that the Union simply came in with more proposals, and at the very end of the meeting, Knowles proposed a 1-year extension of the expiring contract, without any increase in wages, to afford time to negotiate the new agreement. His tone, as he gave that testimony, indicated his belief that in coming back with more proposals, the Union was being intractable. It was *he* who was being rigid and unbending.

Bargaining stopped because of Melfi's own adamant adherence to a bargaining demand to which the Union could not consent in the absence of information which Respondent refused to furnish. He suspended negotiations despite Knowles' warning that a strike would be considered an unfair labor practice strike. He planned and implemented drastic changes and announced them at a point in time which precluded meaningful negotiation. He therefore bargained in bad faith and cannot be permitted to take advantage of a purported impasse which resulted from his own misconduct by implementing the unilateral changes.

Thus, no impasse existed. The parties had held only four meetings, had agreed on a number of items and had not arrived at a point where it could reasonably be said that at the moment there was no chance of an agreement, even on the items regarding which Melfi had been adamant. Moreover, as I find that Respondent engaged in surface bargaining, a finding of impasse is automatically precluded. Melfi had announced his intention to implement his wage proposal despite the fact that there was no impasse. Calling it an impasse cannot put the Respondent in the right at this point, but in any event, Melfi cannot take advantage of whatever it was, even if it is called an impasse, because it resulted from his own misconduct. *Wayne's Olive Knoll Farms*, 223 NLRB 265 (1976).

3. Denigration of the Union

In demanding that the Union present his ''best offer'' to the membership, and by ignoring the Union's wish to continue the negotiations in the time remaining, Melfi denigrated the position of the Union as the authorized bargaining representative of the employees. The extreme nature of the Respondent's wage and benefit package proposals and its adamant adherence to them placed the Union in a difficult bargaining position, made even more difficult by Respondent's failure to furnish financial information. Under the circumstances, I conclude that Respondent's intention was to frustrate the negotiations and unilaterally implement its wage proposal. Melfi did not merely ask for wage and benefit concessions. He demanded their reduction to a nonunion level without meeting the Union's demand for verification of the need for such drastic action, thereby making rejection of his bargaining proposals inevitable. However, even more than that was involved.

The testimony of both Melfi and Hoover makes it clear that Respondent's intention was nothing less than the elimination of union influence on the wage structure. Melfi testified that concessions were a sine qua non of negotiations for a new agreement; that his strategy was to lower labor costs, improve quality and increase productivity. Most of his competitors, he said, were nonunion, and, in addition to competing with Respondent by manufacturing concrete pipe, were manufacturing items capable of supplanting Respondent's product altogether, such as plastic pipe, corrugated metal pipe and corrugated aluminum. He asserted that his knowledge that his competitors had lower labor costs came from his interviews of job applicants, his competitors' bids on jobs, what he learned at industrywide meetings information supplied by the three trade associations to which he belonged, and information gleaned in the course of his normal

duties as Respondent's president, overseeing sales, bids and estimates on jobs. Hoover testified that he told Prenatt that it was necessary for the Union to accept ''the going rate.'' As Hoover put it, they were to take the ''going rate for this kind of skills.'' The remark can be interpreted only one way. The ''going rate'' was obviously not the rate called for in union-negotiated contracts, so Hoover could only have meant for Prenatt to accept a nonunion going rate. He tried to avoid admitting it. When pressed as to what he meant and whether he was in effect telling the Union to agree to the vastly lower nonunion rates paid in unorganized shops, Hoover evaded the question by answering, ''And I honestly can't remember what I was trying to say here, sir.''

The key to Melfi's thinking is the wage differential forced on Respondent by reason of its having been unionized, and the need to return Respondent to equality of bidding power with his competitors. To that end, he gave the Union the names of several competitors who had outbid him in 1986. In other words, he was insisting that equality be restored either by unionizing the competition or by making Respondent the equivalent of a nonunion shop. His offer of $6.50 per hour for classification A and $6 per hour for classification B was based on the nonunion wage rates paid in Respondent's other divisions, which were not unionized. In short, to Melfi, meeting competition meant to go nonunion, either actually or practically.

Unable to negotiate the Union out of existence, he took the practical approach and, as all of the evidence herein indicates, promoted a strike and proceeded to hire nonunion replacement workers. There were 19 unit people on payroll at the start of the strike. The company records showed that Respondent continued to hire employees to do bargaining unit work after July 30, when the Union made the offer to return to work. The first employees hired after that date were hired on August 3. Approximately 15 replacement workers were hired.

David Guiffrida, a replacement worker hired in June, was interviewed for his position by Timothy Vanderpool. He quoted Vanderpool as promising him that the job would be permanent because the strikers were not coming back and the job was nonunion. He asked him, ''Are we being hired nonunion or union?'' In other words, ''Is there a union for us to apply membership?'' And he said no.

Bob Weaver was identified by Guiffrida and by Melfi as a foreman. Melfi testified that Weaver gave the employees their day-to-day assignments, followed up to see that they were performed and had some disciplinary authority, thus establishing his supervisory status. (Melfi later disclaimed knowledge of whether Weaver had disciplinary authority. I do not credit his disclaimer, inasmuch as Melfi, Vanderpool and Weaver constituted the entire management and supervision.) He assured employees that the Union was ''history'' and would not be returning:

> Q. Describe the conversation you had with Mr. Weaver.
>
> A. On a few occasions . . . either on break or lunch or maybe before work, the question got brought up on numerous occasions, once by myself and other times by other employees, as far as the status with the union, how stable were our jobs. And he repeatedly said, ''Don't worry, your jobs are permanent, the union won't be back.''
>
> . . . .
>
> Q. Do you recall anything said about whether or not when or at what time or condition the strikers would be returned?
>
> A. We were told that they would not be returned.
>
> Q. Any statement made as why they would not be back?
>
> A. I don't recall anything specific. It was just pretty much generalized that they would not be back, we're going to continue with the crew we have, and , ''They're history,'' is one way that Mr. Weaver had put it at one time.
>
> . . . .
>
> (By Mr. Newsome)
>
> Q. Just state what he said?
>
> A. What he said was over and over whenever it was brought up was that, ''You are permanent employees, they will not be back. Do not worry about it. Do not concern yourself that you're going to be out on the street.''
>
> Q. When he said they would not be back, who was they?
>
> A. The striking employees.
>
> (By Mr. LaVaute)
>
> Q. Mr. Guiffrida, do you recall talking with me last night?
>
> A. Yes, sir.
>
> Q. Did you tell me last night that someone from the company said they would never take the union guys back?
>
> A. Yes.
>
> Q. Was that said to you by the company?
>
> A. Not by the company, by Mr. Weaver.
>
> Q. That's who I mean, somebody?
>
> A. I'm sorry.
>
> JUDGE LAWRENCE: He said Mr. Weaver said it.
>
> Q. When did he say that?
>
> A. I don't recall the date or conversation, but it was one of the conversations that we all had as a group.
>
> Q. There is no doubt in your mind that that's the phrase he used, ''we would never take the union guys back''?
>
> A. Yes.

None of Guiffrida's testimony was controverted.

4. Desire to frustrate negotiations

Respondent's refusal to furnish the financial records requested by the Union, based on an insincere excuse, inevitably tended to frustrate the negotiations. In view of the history of the first three meetings, Melfi appears to have had no reason apart from his own adamancy to treat the fourth meeting as the one at which an agreement had to be reached. Nevertheless, that was patently his attitude. He presented the company offer, and, according to him, ''I stated it was the best offer, company's best offer.'' In view of his insistence that he made no mention of the Company's financial condition, either then or at any other point in the fourth meeting (nor for that matter in any of the other meetings) there is absolutely nothing in the record to indicate on what basis he

expected the union negotiators to agree that the offer being made was the ''best offer'' the Company could make. He was compelling the Union to operate blindly, and it inevitably did so, responding to his demand for concessions with a counteroffer demanding an increase in wages of 40 cents the first year, 35 cents the second year, and 30 cents the third year, which by Knowles' own admission reduced the Union's original demand, for an increase of 4-percent a year, by about a nickel an hour. At another point, Knowles suggested increases of 30 cents each year.

Melfi steadfastly refused access to the records with full awareness that the Union could not agree to his demand for concessions without access to the Company's financial records, conceding that Prenatt stated the International's policy right after he read his opening statement at the first session. Melfi's response was simply to confront Prenatt with his own policy, telling the union negotiators that the Company was a privately, family-owned concern ''and it was strictly against company policy to give anyone our books.'' He adopted an inflexible position from which he never wavered, even asserting, in the course of his testimony, that company policy precluded showing financial records to banks. By itself, that is utterly incredible, and and never could become credible in view of the ease with which the purported policy was abandoned in order to settle the first unfair labor practice proceeding. Hoover testified that in two telephone conversations on June 1 with Ghearing, he read Ghearing a profit-and-loss statement for December 1986 which summarized the whole calendar year, but he did not bother to extract a promise of confidentiality from Ghearing. He professed to be unable to remember whether the subject of confidentiality had even arisen. He did not object when Ghearing suggested that he deliver the profit-and-loss statement to Prenatt. He did not attempt to protect its confidentiality when he delivered it to Berger on June 25. He gave it to Berger on Berger's assurance that the Union had signed the settlement agreement, but the agreement has no provision for preserving the confidentiality of the information.[6]

The Union's bargaining position on the wage and benefit package was obviously affected by the Respondent's refusal to grant access to its financial records. Hoover himself complained that the Union's final demands remained unreasonable even at the very end. If they were, then, as I have pointed out, it was because of Respondent's failure to give the Union the information it needed to perform its function. The financial records contained information which the Union should have had in order to negotiate intelligently. But the Union's negotiating position was undoubtedly affected by Respondent's failure to divulge several other important items of information. For example, Melfi testified that he never discussed comparability of nonlabor costs with the Union. Hoover testified that it was urged upon Prenatt that enabling the Company to make competitive bids would ultimately result in the employees earning more; but though Hoover had been advised by Respondent that such increased earnings would result from the fact that the number of hours they worked would increase from 60 to 100 percent of their working time, he never offered Prenatt any evidence that such an increase in the number of hours worked was probable. Respondent also, according to Hoover, represented to him that the company had lower nonlabor costs at the Syracuse division than in any of their other operations, but that information was not disclosed to the Union. Melfi, whose authority extends over the Company's nonunion branches in Rochester, Binghamton, and Buffalo, New York, was aware whether or not nonlabor costs of those divisions were comparable to those of the Syracuse branch and whether Syracuse's labor costs were really considerably higher because of the union contract. It is a point he never took pains to demonstrate to the Union. He knew, and conceded in his testimony, that the Company's financial records would have shown that it was Syracuse's labor costs that were the cause of the Company's losing out on bids because its bids were higher than those of its competitors, but he never made records available to the union negotiators so that they could see that.

Hoover conceded that no explanation was offered as to why Melfi's proposal was the Company's ''best proposal'' or why Knowles' suggestion that the existing contract be extended was unacceptable. He conceded that they did not consider offering an extension of the contract for some period less than a year in response to Knowles' offer of a year's extension and he conceded the reason as well: ''We wanted to get concessions. The only proposal that was ever made about an extension was one for a year, and we were unwilling—we didn't consider offering an extension in response to theirs, no, sir.''

Hoover's testimony makes it clear that he and Melfi knowingly permitted the union negotiators to operate under a misapprehension of fact in believing that the Company was losing money, and that they could not bargain on that supposition without verification, as a matter of ordinary prudence and as a matter of International policy. Nothing was done to enlighten them. The attitude of Hoover and Melfi was illustrated by Hoover's testimony as to his understanding of what Prenatt was referring to when he offered to ''share the pain.'' Melfi and Hoover had greeted the offer with silence, misleading the union negotiators into a deeper conviction that Respondent was inserious financial difficulty and that under rules imposed by the International they were required to obtain verification. When asked about it at the hearing, Hoover was evasive, suggesting that Prenatt's remark must have referred to the employees' pay cut. I pointed out to him that that was painful to the employees, not to the Company, and asked him what he had thought Prenatt was was referring to as the pain. He replied:

> I understand based on the context of the conversation that if the company's losing money, there's a pain, and the union would share some of that by taking less money. That would help share the pain of the company losing money, everybody would take less.

[6] Counsel for the Charging Party moved to strike Hoover's testimony concerning conversations with Ghearing on the ground that Hoover was acting in a dual capacity as attorney for Respondent and a witness to events at issue. I reserved ruling on the motion until the transcript was available, since Hoover had given testimony respecting his failure to anticipate that he might be called as a witness. It is Hoover's credibility, not the propriety of his action, that is pertinent to this proceeding. I perceive no respect in which Hoover's activity in the dual capacity of counsel and witness has affected his credibility and I have, in any event, based credibility findings respecting matters in which his testimony conflicts with that of other witnesses on the basis of other factors. Accordingly, the motion to strike his testimony is denied.

Though Prenatt's remark was the kind that called for a response, Hoover conceded that he did not reply to it. He neither confirmed nor denied the suspicions of the union negotiators, but deliberately left them in the dark, adhering to their original negotiating positions.

5. Other indications of surface bargaining

Hoover's testimony provided several other indications that Melfi had not been interested in facilitating or continuing negotiations on March 20 and that thereafter he had had no interest in resuming them. Despite Hoover's testimony that he had been concerned that the talks were breaking off, his lack of interest in continued negotiations is evident.

At the June 25 meeting with the Federal mediator, after the agreement settling the unfair labor practice case was signed and the profit-and-loss statement turned over, the mediator advised Hoover and Melfi that the Union wanted to break off the talks. Hoover did not ask the mediator for the reason and did not seek out any union representative to find out why the meeting could not be continued; and though the union representatives were still in the conference room when he retrieved his belongings from it as he departed, he simply shook hands with them. He testified that he could not remember if there was any conversation about the fact that the meeting was not continuing. He has not asked the Union for further meeting since then.

Melfi also abandoned or altered negotiating practices which he had followed in prior years. Whereas in past years the parties had continued their negotiations through the night to reach agreement, on the occasion of the fourth meeting Melfi refused to work past 6 p.m., refused to extend the life of the current contract for any period and ended the meeting in a contumacious manner which had been foreshadowed by the way the first and third meetings had ended. The first meeting was shortened by Melfi because he said he had to check a couple of things at the plant; the third meeting ended when he announced that his dinner was waiting at home; and he ended the fourth with the announcement that the Company had made its best offer and that he thought the Union should advise the membership to accept it, because if they did not accept it, he was going to implement certain major changes unialterally. The testimony is in conflict as to whether anyone told the Union to ''take it or leave it,'' but I think the record so adequately demonstrates that Hoover and Melfi were of a frame of mind consonant with such a remark that it is really unimportant whether they actually articulated it.

(I do not consider as indications of surface bargaining the facts that Respondent engaged security personnel, required strikers to remove their property from lockers after they demanded reinstatement, and disagreed with the Union on which matters still remained open for discussion as of March 20.)

In *Reichhold Chemicals*, 288 NLRB 69 (1988), the Board listed some of the criteria for determining, on the basis of overall conduct, whether an employer has bargained in good faith. These included (1) readiness at all times to meet and bargain; (2) attendance at all shceduled meetings; (3) fulfillment of procedural obligations; (4) exchange of proposals; (5) modification of proposals otherwise adhered to in order to facilitiate agreement, i.e., movement on items; (6) communication with the mediator; (7) concessions; (8) agreement on substantial items; (9) correspondence between proposals and items in other union agreements or in earlier agreements; (10) absence of improper conduct; and (11) absence of proposals seeking to negate the Union's fundamental representational role.

The evidence in this case establishes that Respondent failed to meet at least seven of these criteria. It certainly did not meet the requirements numbered 1, 5, and 7–11.

D. *Refusal to Reinstate*

1. The nature of the strike

On Saturday morning, March 21, the membership and the negotiating committee, some 16 persons in all, met away from the plant to review what had transpired at the 4 negotiating sessions. Prenatt testified that he gave the members a full report and that he told them ''that we requested numerous times for the company to open up their books and prove that they were losing money so we could come back and recommend to you people to take the concessions.'' Prenatt testified that he explained to them that it was International policy ''that when you face deep contract concessions such as we were facing here, that you have to have proof by the company willing to open up their books, so that a technician from Pittsburgh or the Pittsburgh people who have the expertise in this area can verify that the company is losing money.'' The Respondent's demands for concessions were reviewed. Prenatt told them that ''all he got from Nick Melfi was we can't afford to pay it, we're losing money, we've got to be competitive, we've got to have these things back.'' He testified, further:

> I told the membership that numerous times during negotiations at all four meetings I requested him to open up his books to give the people from Pittsburgh those figures so they could make a determination, and every time that I asked him that he refused me. . . . I told them he refused to open up his books because he kept giving me the same answer, ''This is a family concern and I'm not going to open them books up to you people.''

Bobby Marshall testified:

> Q. At this meeting did any of the guys who were there to vote, did any of the guys have anything to say about the fact the company wasn't opening the books?
>
> A. Quite a few of them. They thought it was very unfair because, see, in the first place nobody wanted to go on strike. Everybody wanted to work and they feel like if they had opened the books and showed them they need the concession, then we would have went and gave them most of this in order to still continue to go to work and they were concerned about that. They couldn't understand why they didn't want to open the books to let them see that they really needed.

The Company's last offer, which included Melfi's deep concessionary package, was put to a vote. Before the vote, it was explained that rejection of the contract was equivalent to a strike vote. The recommendation of the bargaining committee, in Prenatt's words, ''was to reject the final offer on the grounds that he wouldn't open up his books and they

couldn't verify or justify that deep of concessions to the membership.'' The offer was unanimously rejected.

The members were in an angry mood before the vote. The failure of Respondent to make the requested disclosure of the records was a major element in fueling their indignation. I note that their statements, as quoted by Prenatt, did not seem to relate directly to disclosure. One remark was, ''We don't know where this guy is coming from.'' Another was, ''We're not back on the planation, Goddamn it, and we don't work down South any more. If we're going to work for $6 an hour, that this is ridiculous.''

He testified:

> Q. Did they say anything about justifying such a deep cut?
>
> A. They asked me, ''How do you know he's telling you the truth?'' I said, ''I don't know if he's telling me the truth because he won't open up the books.'' That's all I could respond to them. They were hostile and they were mad.

While concern for verification of Melfi's purported remarks is not explicitly articulated in the quoted remarks of the members, it is clearly expressed in Prenatt's report to them. Of course, it is conceivable that Prenatt's report to the membership was itself inaccurate; however, at that time reinstatement was not an issue and I infer that Prenatt reported the events of the negotations pretty much as they happened. In that case, Prenatt would have reported Melfi's opening statement, his own repeated requests for access to the financial records of the Company and Melfi's repeated refusals, in accordance with my own findings as to what was said. These were the facts confronting the membership. There is no doubt, therefore, that the strike which began on March 23 was the direct result of Respondent's having refused the requested access to the records.

Since the failure to permit inspection of the company records was an unfair labor practice which was one of the elements of Respondent's conduct which impelled me to conclude that Respondent had engaged in surface bargaining, the strike must be held to have been started as a direct result of Respondent's unfair labor practices and to have been prolonged by Respondent's continued refusal to negotiate and its failure to evince any interest in resuming the negotiations, apparently being satisfied to continue operation with replacement workers at nonunion wages.

The General Counsel also contends that it was prolonged by other provocative conduct of the Respondent away from the bargaining table which violated Section 8(a)(5) of the Act. On August 3, the date of return specified in the Union's offer to return to work, the East Syracuse police chief contacted Berger and there were police at the plant. The General Counsel asserts that the involvement of the Syracuse police at the behest of Respondent was unnecessary and provocative, inasmuch as the strike had been in progress for four months without a single incident. The General Counsel also cites Vanderpool's insistence that personal property which the strikers had left in their lockers be removed, while permitting only one person to enter the plant to collect their belongings. Berger emphasized the fact that the person who went to retrieve the material found it in dust-covered plastic bags, indicating that it had been removed to one side at the beginning of or early in the strike. None of these actions, however, are inherently provocative and all are well within Respondent's legal rights. I find no evidence in the record which would justify the conclusion that these actions were calculated to, or did, prolong the strike. As I have already noted, the strike was prolonged by Respondent's lack of interest in bargaining in good faith with the Union.

2. Offer to return and refusal of reinstatement

From the end of July to the end of August, the Union and Respondent engaged in correspondence which embodies their respective positions on the question of reinstatement. On July 29, Berger sent Respondent a letter as follows:

> July 29, 1987
>
> The United Steelworkers of America, Local Union 14534, hereby unconditionally offers on behalf of all striking employees, to return to work immediately.
>
> Employees will report to work on August 3, 1987 at 7:00 a.m.
>
> H. Mickey Berger
> Staff Representative
> United Steelworkers of America

Melfi responded on July 30, advising that ''the company has no job vacancies at this time for returning strikers'' and that, effective August 3, strikers would be placed on a preferential hiring list, for which it was necessary for them to make an appointment with the personnel office ''to fill out the appropriate forms indicating those jobs for which the strikers are interested in filling as vacancies become available.'' Berger was told to address any questions regarding procedure to Vanderpool.

On July 31, by both letter and telegram, Berger informed Melfi that the Union believed the workers were entitled to immediate reinstatement. Berger also stated that the financial information furnished on June 25 was ''not satisfactory to resolve Complaint 3–CA–13724.''

Vanderpool responded with a letter on August 3 in which he asserted that strikers ''would be afforded their job rights in accordance with the law'' and should make themselves available ''for any job openings that arise.'' He noted that no one had returned to work on August 3, and asserted that the financial information furnished was in accordance with the agreement between Hoover and Prenatt. Most importantly, however, Vanderpool unlawfully linked reinstatement to acceptance of Melfi's ''best offer:''

> Last week we informed you that if your membership was making an unconditional offer to return to work *pursuant to the terms and conditions offered at the time your union elected to strike*, they would be afforded their job rights in accordance with the law. [Emphasis added.]

On August 7, counsel for the Union again asserted that information had not been provided as agreed and, noting that the Company had taken the position that there were no openings available for strikers, pointed out that Respondent had no right to condition reinstatement upon acceptance of contract terms.

On August 20, Vanderpool wrote to Berger that there would be a job opening on August 27 for which strikers ''who make an unconditional offer to return to work'' would be considered on ''a nondiscriminative basis.'' Union counsel responded on August 26, reminding Vanderpool that an unconditional offer had already been made and that strikers were entitled to immediate reinstatement to the jobs formerly held by them.

As I have found that the strike was caused and prolonged by the unfair labor practices committed by Respondent, the striking employees had the right to immediate reinstatement to their former positions, without being required to agree to any of the terms of Respondent's offers in the negotiations which were outstanding at the time the strike commenced. Respondent's refusal to reinstate them violated Section 8(a)(1) and (3) of the Act.

Counsel for Respondent has argued that the offer to return was not unconditional, but was made subject to acceptance of the Union's last offer in the contract negotiations. He makes this tortured argument by wrenching from context a sentence contained in the letter which union counsel sent on August 7 to Vanderpool: ''It is the Union's position that all the strikers were entitled to immediate reinstatement in accordance with the Union's offer.'' The previous sentence in that letter explicitly dealt with ''the Union's unconditional offer to return.'' The subsequent reference in the letter to the ''Union's offer'' cannot be reasonably construed except as a reference to the offer to return. It is patently not a reference to any offer in the negotiations, especially as union counsel concluded their letter with an explicit repudiation of the idea expressed in Vanderpool's letter that Respondent could condition reinstatement upon acceptance by the strikers of Respondent's last offer in the negotiations.

CONCLUSIONS OF LAW

1. Respondent at all pertinent times herein was and is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, at all pertinent times herein, was and is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (5) of the Act (a) by failing to bargain in good faith with the Union; and (b) by failing and refusing to furnish to the Union financial information, requested during the negotiation sessions on March 10, 16, 18, and 20, 1987, and relevant and necessary to the Union's performance of its duties as bargaining representative of the Respondent's employees in the following appropriate unit:

> All employees of the Respondent at its East Syracuse, New York facility; excluding all superintendents, assistant superintendents, foremen, professional employees, quality control employees and office clerical employees.

4. Respondent violated Section 8(a)(1) and (3) of the Act by refusing, on and after July 30, 1987, to reinstate members of the bargaining unit who engaged in an unfair labor practice strike.

5. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist from any continuing violation of the Act and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent caused an unfair labor practice strike by engaging in surface bargaining and committing other violations of the Act, including refusal to furnish information to which the Union was entitled. The violations of the Act were all related to the contract negotiations between the Respondent and the Union in the spring of 1987. I will therefore recommend an order requiring Respondent to cease and desist from interfering in that or in any related manner with the rights guaranteed the employees under Section 7 of the Act. I will further recommend an order requiring that the strikers be offered immediate and full reinstatement to their former job, or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or to rights and privileges previously enjoyed by them, and that Respondent make them whole for any loss of earnings that they may have suffered by reason of the unlawful failure to reinstate them by payment to them of a sum of money equal to that which they normally would have earned as wages, from July 30, 1987, the date of the unlawful failure to reinstate them, to the date of their actual reinstatement, less net earnings, computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Ogle Protection Service*, 183 NLRB 682, 683 (1970), as applicable, to which shall be added interest computed thereon in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[7]

Implicit in these directions, of course, is the assumption that the strikers will return to work at and receive backpay at the rate of the pay scale in effect before the unilateral changes instituted by Respondent on and after March 23. Lest there be any misunderstanding in that regard, I will recommend an Order which specifically requires Respondent to revoke changes unilaterally instituted by it after the termination of negotiations by Melfi and restore the status quo ante from the date of Respondent's unlawful unilateral implementation of its proposals to the date a new agreement is reached or impasse arrived at. *NLRB v. Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir. 1982). As part of the overall rectification of the situation created by Respondent's violations of the Act, I will recommend that Respondent be directed to bargain in good faith with the Union upon request for negotiations by the Union and that it furnish the Union with pertinent financial information.

[Recommended Order omitted from publication.]

[7] Under *New Horizons*, interest accruing after January 1, 1987, is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.